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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

No.

BRIGHAM YOUNG UNIVERSITY,
PETITIONER

vs.

UNITED STATES OF AMERICA
AND JAMES OYS,
AN OFFICER OF THE
INTERNAL REVENUE SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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vs.

UNITED STATES OF AMERICA AND JAMES OYS, AN OFFICER OF THE INTERNAL REVENUE SERVICE

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QUESTION PRESENTED

Whether, the private records of a charity are susceptible to search by the Internal Revenue Service on the bare assertion that some donors, who are unrelated in every way to those whose records are sought, have claimed excessive values for gifts made to the charity.

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Brigham Young University petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the district court (App. A., infra, 1a-12a) is reported at 485 F. Supp. 534. The opinion of the court of appeals (App. B, infra, 13a-26a) is reported at F.2d .

JURISDICTION

The judgment of the court of appeals was entered on June 11, 1982. Petitioner moved for a rehearing on July 29, 1982 which motion was denied on August 26, 1982 (App. C, infra, 27a, 28a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent portions of the Internal Revenue Code, Sections 7601, 7602 and 7609(f) are set forth in Appendix D, infra, 29a–31a.

STATEMENT

1. Brigham Young University (BYU), petitioner herein, is a private university organized under the laws of the State of Utah. The university is qualified as a tax exempt organization under Section 501(c)(3) of the Internal Revenue Code.

2. From time to time, Brigham Young University (BYU) receives donations of cash and other property. Upon receipt of a donation, BYU acknowledges the contribution in a letter

of gratitude, but BYU has no knowledge as to the values claimed by donors on their returns, and is not involved in any way in arriving at such values or in suggesting that inflated values be claimed.

3. During the years relevant to this action, BYU received a large number of donations of art objects which had been arranged by the same art dealer who, the IRS concedes, was not in any manner associated with BYU. BYU also received 66 donations of silver mining claims, all arranged by the same geologist, who again, was not associated with petitioner in any way. With the cooperation of petitioner in identifying donors in these categories, the IRS audited all 148 taxpayers and alleges that most had claimed deductions exceeding the fair market value of their gifts. In each case, the donors had purchased the donated property from the art dealer or the geologist with the representation that a deduction could be taken for from two to ten times the donors' cost and that such inflated deduction could be taken in the year of purchase. The IRS does not assert that the donors whose records are sought in this action participated in any such scheme.

4. In addition, the IRS allegedly examined as many as 14 other returns of donors to BYU and determined that they had overvalued their donations.

5. Based on this experience, the IRS contends that it has established a reasonable cause to believe that all or some of the remaining donors of gifts in kind to petitioner may have overvalued their contributions. The IRS concedes that there is no common denominator between the donors audited and the donors whose records it seeks to examine except that each made a gift to BYU. It is the position of the IRS that this showing is sufficient to meet the "reasonable cause" standard of Section 7609(f) of the Internal Revenue Code.

6. Section 7601 of the Internal Revenue Code gives the IRS a broad mandate to "inquire after and concerning all persons . . . who may be liable to pay an internal revenue tax. . . ." Section 7602 confers upon the IRS the power to summon documents from any source provided the documents are relevant or material to the IRS's investigation. Section 7609, apparently passed in 1976 in response to this court's decision in *United States v. Bisceglia,* 440 U.S. 141 (1975), was enacted to provide some measure of protection for records in the hands of third party record keepers. Section 7609(f) requires the IRS to make a showing that the summons is limited to an ascertainable group or class of persons and that *reasonable cause* exists to believe members of this group or class may have failed to comply with the internal revenue laws.

7. In this case the IRS obtained a summons for the records of BYU concerning all donors in kind for the years 1976 to 1978. BYU challenged the summons, and after hearing, the District Judge refused to grant enforcement on the ground that the IRS had failed to establish any link between the filers of the examined returns and the remaining donors to BYU. In fact, the IRS had specifically conceded there was no such link; thus the requirement of reasonable cause had not been met.

8. The court of appeals reversed this holding, reasoning that the mere fact that 162 donors of gifts in kind to petitioner had overvalued their donations was reasonable cause to believe other donors had similarly overvalued their contributions. The court ignored BYU's argument that some common link other than mere donation to the university must be alleged in order to establish a reasonable basis for suspicion. The court also ignored BYU's contention that the Service's "sample" statistics of donors was intentionally marshalled around two tax evasion schemes which the IRS conceded had no relation to the unknown donors.

Reasons the Petition Should Be Granted

I. The IRS' Petition for Summons Is Based on a Logical Fallacy and, Therefore, Cannot Meet the Statutory Requirement That the IRS Have

a "Reasonable Basis" to Believe the Records Being Sought Are Those of Tax Evaders.

The Tenth Circuit ignored BYU's contention that the Section 7609(f) requirement that a summons issue only where there is a "reasonable basis" to believe tax evasion has occurred requires the IRS to prove its suspicions are logical. In its briefs and in argument, BYU pointed out that one cannot make logical conclusions about a group based on characteristics of certain members of the group unless one knows these characteristics are distributed throughout the group. Thus, one cannot make conclusions about the eye color of a group based on the fact that some members are blue eyed. One must have further information about the distribution of eye color in the group to make conclusions about it. It is fallacious logic to draw conclusions about a whole from a part unless one knows how the part relates to the whole. This is the blind man and the elephant fallacy.

In this case the IRS' reasoning amounts to the assertion that gifts to charity are all subject to examination because some taxpayers have used such gifts to underpay taxes. No logical connection between the tax evaders and the remaining donors need be shown.

The most recent decision of this court on the John Doe Summons is *United States v. Bisceglia,* 440 U.S. 141 (1975). In that case the court per-

mitted the IRS to use a John Doe summons to identify the depositor of a large amount of deteriorated high denomination currency. The IRS was able to show that currency in such denominations and in such condition was frequently obtained from untaxed hoards and therefore there was a reasonable prospect that information leading to relevant tax information might be obtained. This court held in *Bisceglia* that the constitution requires only reasonable ground for belief that relevant tax information would result from a John Doe summons. Probable cause was not required. Section 7609 was added to the Code the year following this court's decision in *Bisceglia*. In its reports, Congress cited *Bisceglia* with approval. There is no indication that Section 7609 was any more than an attempt to codify that holding. Congress required only a finding of a "reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, . . ." I.R.C. § 7609(f)(2). This standard is necessarily vague, yet Congress clearly stated that it was not giving the Service carte blanche to obtain a John Doe summons on the mere possibility that tax liability may exist:

> While the committee believes it is important to preserve the John Doe summons as an investigative tool which may be used in appropriate circumstances, at the same

> time, the committee does not intend that the John Doe summons is to be available for purposes enabling the Service to engage in a possible "fishing expedition." For this reason, the committee intends that when the Service does seek court authorization to serve John Doe summons, it will have specific facts concerning a specific situation to present to the court.
>
> House Ways & Means Committee, H.R. No. 94-658, 94th Cong., 2d Sess., *as quoted in* 1976 U.S. Cong. & Adm. News 3207.

In this case, the Service claims the right to define the group or class of persons it may reasonably suspect on any common trait regardless of how remote such common denominator may be from the specific fact or specific situation which triggered IRS interest. Thus, so long as the unknown taxpayers share any common characteristic with the audited taxpayers, their records are susceptible to a John Doe summons. In this case the IRS asserts that the mere fact of a gift in kind to BYU justifies a search of taxpayer records.

The Tenth Circuit opinion grants this unrestrained power to the Service. The Service concedes that the John Doe contributors share no other characteristic with those whose returns it has examined except all made gifts in kind to BYU. The Service admits that there is no evidence of a common scheme or means of arriving

at gift valuations. The Service instead argues that since some donors overvalued their donations to petitioner, it is reasonable to believe others may also have overvalued their gifts.

> We conclude that having previously examined the returns of some 162 donors of gifts in kind to BYU and having found that all were overvalued, the IRS has established a reasonable basis for believing that *some* of the remaining donors of in kind gifts *may* have also overvalued their gifts. Such reasoning makes sense to us.
>
> Appendix B, page 26a.

This is a standard without limit, without logic. All taxpayers share common characteristics with each other—they have the same color of hair, work at the same office, visit the same doctor, vacation at the same resorts. If the Service discovered that hundreds of taxpayers who lodge at Hilton Hotels take excessive medical deductions, the IRS would under this rationale be able to subpoena all the records of Hilton Hotels. Obviously *Bisceglia* never sanctioned such far-ranging powers and Congress, in codifying *Bisceglia*, intended that the criteria for defining a group of taxpayers to be investigated have some "reasonable" relationship to the specific circumstances triggering the investigation.

II. The IRS' Petition for Summons Is Based on Erroneous Application of Statistical Analysis

and Therefore Does Not Meet the Statutory Requirement of Reasonable Basis.

The IRS and the Tenth Circuit have relied on the barter exchange cases as authority for issuing the summons in this case. The barter cases (*In re John Does, Members of the Columbus Trade Exchange,* 671 F.2d 977 (6th Cir. 1982) and *United States v. Pittsburgh Trade Exchange, Inc.,* 644 F.2d 302 (3rd Cir. 1981)) all involve companies which have been organized to facilitate the exchange of goods or services without any cash payments. In these cases the IRS was able to show that such transactions are often used to disguise taxable transactions and to avoid reporting them. In fact, one of the principal reasons for barter transactions is to avoid taxes.

These cases, however, are not relevant to the BYU case. There are a great many reasons for making gifts to a university. A feeling of obligation to one's alma mater, a desire to further the education of the young, a need for recognition, a desire to serve, etc. None of these is related to tax evasion. Thus there is nothing inherently suspect, from a tax point of view in making a donation to a university.

The Service seems to be arguing that it has sampled 162 returns of BYU donors and on the basis of that sample it was concluded that BYU donors are likely to be tax evaders. This would be reasonable if the 162 donors were a true unbiased sample.

A fundamental of statistical sampling is that the sample be unbiased, i.e., that there is a reasonable probability that the sample includes a fair distribution of the characteristics of the population being sampled (Packard & Faulconer, Introduction to Logic, 41 (1980)).

In this case the IRS admits it drew the entire sample from suspect transactions. BYU furnished the names of all art donors under an IRS subpoena and the names of missing claim donors were obtained by subpoena from the geologist who originated the scheme. Thus, the sample was neither random nor unbiased. Only suspected tax evaders were included. Clearly this cannot be said to be a representative sample of BYU donors. The sample forms no "reasonable basis" for enforcing the summons.

III. Certiorari Should Be Granted Because the Decision Below Destroys the Protection of Privacy Created by Section 7609(f) for Third Party Records.

While there is at present no precise conflict between the circuit concerning the interpretation of Section 7609, the courts have failed to give any weight to the restraints on third party searches imposed by this court in *Bisceglia* and the Congress in § 7609. Confusion has resulted.

In the instant case, the district court in Utah

determined that the IRS sampling of petitioner's donors did not constitute a reasonable basis for suspecting overvaluation by completely unrelated donors. The Tenth Circuit Court reversed this finding but did not attempt to define guidelines by which district courts might review such issues in the future. In the Third Circuit, the IRS compelled production of all records of a barter-exchange association with a John Doe summons on the allegation that such transactions are "inherently susceptible to tax error." See *United States v. Pittsburgh Trade Exchange Inc.*, 644 F.2d 307 (3rd Cir. 1981). On almost identical facts, in the Sixth Circuit, the district court determined that the IRS could not meet its burden of "reasonable basis" by extracting statistics from similar but unrelated transactions. The Court of Appeals reversed, holding that the transactions as a body were historically and inherently suspect. See *In re John Does, Members of the Columbus Trade Exchange,* 671 F.2d 977 (6th Cir. 1982). The Fifth Circuit reconsidered its decision in *United States v. Humble* following this Court's holding in *Bisceglia* and determined that enforcement of the John Doe summons was still improper where the information sought did not relate to a specific, extraordinary transaction, nor did the facts support the likelihood of unpaid taxes. See *United States v. Humble Oil & Refining Co.,* 518 F.2d 747 (5th Cir. 1975). In the Tenth Circuit, the Oklahoma federal court for

the western district, ruled in a case closely analogous to petitioners that the IRS could not demonstrate a reasonable basis for suspecting non-compliance by oil and gas producers connected with Kerr-McGee. That court determined that statistics sampling similar agreements and contractors were an insufficient basis to conclude that tax evasion may occur. See *In re Oil and Gas Producers,* 500 F. Supp. 440 (W. D. Okla. 1980).

The Supreme Court should grant certiorari in this case to clarify the meaning of the term "reasonable basis," and to insure that the right to privacy of those whose records are protected by Section 7609(f) will be maintained. If the decision below is allowed to stand the statutory protection will be totally destroyed. The IRS will have unrestrained access to private records on the mere assertion that a tax evader is in some way (however remote) related to another taxpayer. Logical connection will not be required.

Conclusion

To preserve the privacy of third party records from unwarranted and unlawful intrusion by the IRS, petitioner prays that the Supreme Court grant certiorari in this case.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America and James Oys, an Officer of the Internal Revenue Service, Petitioners,

v.

BRIGHAM YOUNG UNIVERSITY and Dallin H. Oaks, President of Brigham Young University, Respondents.

Civ. No. C-79-0753.

United States District Court,
D. Utah, C. D.

March 11, 1980.

Ronald L. Rencher, U.S. Atty., for the District of Utah, Salt Lake City, Utah, Robert S. Horwitz, Tax Div., Dept. of Justice, Washington, D.C., for petitioners.

H. Hal Visick, Provo, Utah, for respondents.

WINDER, District Judge.

On November 5, 1979, the government filed a petition for leave to serve a third party John Doe summons in File No. C-79-0647. Thereafter, this court signed an order allowing the

IRS to serve a John Doe summons upon Brigham Young University (BYU), in the matter of the tax liability of donors of charitable contributions in kind, excluding securities, to BYU during the years 1976, 1977, and 1978. The summons was served on BYU, who refused to produce the information requested. On December 21, 1979, the government filed a petition to enforce the IRS summons, File No. C-79-0753.

The matter was referred to the magistrate, pursuant to 28 U.S.C. § 636(b)(3), with directions to conduct such hearings as necessary. An order to show cause why the respondents (BYU) should not be compelled to obey the IRS summons was also issued. A hearing was held before the magistrate, after which and on February 5, 1980, the magistrate filed his Report and Recommendation. He recommended that this court order BYU to comply with the summons to produce the requested information. BYU has objected to the magistrate's report and the government has filed its response to BYU's objections. The matter is now before this court for the purpose of determining whether the magistrate's report should be adopted or rejected.

The pertinent facts are not seriously in dispute. BYU is a private institution of higher education located in Provo, Utah. As such, it is exempt from income taxation under 26 U.S.C. § 501(c)(3). Under § 170, gifts to BYU are charitable contributions that are deductible

from the donor's income. A taxpayer who makes a charitable contribution in kind to BYU may deduct from income in the year of the gift the fair market value of the property contributed as of the time of the contribution, subject to the limitations set forth in § 170.

The IRS has audited some 162 federal income tax returns of persons who made charitable contributions in kind to BYU. Eighty-five of these returns were for taxable years ending before January 1, 1976. The remainder were for taxable years ending after December 31, 1975. The IRS has proposed deficiencies for all the returns for years ending before January 1, 1976, and has proposed or expects to propose deficiencies for all the returns for the years ending after December 31, 1975. The proposed deficiency in each case results from a determination by the IRS that the actual fair market value of the property contributed is substantially less than the amount claimed on the return. Because of these overvaluations, the IRS has commenced an investigation of the correct tax liability of all persons who made gifts in kind, excluding securities, to BYU during the years 1976, 1977, and 1978. By these proceedings it is seeking to obtain from BYU the names and addresses of all such donors. BYU has acknowledged their number totals approximately 300.

Of the overvaluations which the IRS has determined so far, all but fourteen deal with one

group of donors of art objects and another group of donors of silver mining claims. BYU has offered to provide the IRS with the names and addresses of the individuals in these two groups. The members of each of these groups had certain common characteristics. The donors of the art objects participated in a transaction devised by an art dealer or dealers, part of which involved the dealer or dealers appraising the art objects for purposes of valuation. Similarly with the silver mining claims, one mining engineer had appraised all of the mining claims of that group of donors. There was no such common characteristic relating to the fourteen other donors investigated by the IRS and not within the art objects or silver mining claim groups. So far as the record discloses, these fourteen donors made their overvaluated gifts under circumstances where no relationship has been demonstrated between their gifts and that of any other gift in this group except, of course, that all made a gift in kind to BYU.

Both parties agree that the requirements of 26 U.S.C. § 7609(f) govern the result in this case. That section states:

Additional requirement in the case of a John Doe summons.—Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that—

(1) the summons relates to the investigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

[1,2] BYU argues that there is no ongoing investigation and that the requirements of subsection (1) of § 7609(f) have not been met by the IRS. It is clear from the record, however, that the summons does relate to an investigation of a class of persons within the meaning of § 7609(f)(1). Likewise, the court rejects BYU's objection that because the IRS already has technical possession of the records it seeks it therefore has not met the requirements of subsection (3). Several recent cases have held that the mere technical possession of records by the IRS where there is no method of practical retrieval does not defeat the subsection (3) requirement of § 7609(f). *United States v. First National State Bank,* 616 F.2d 668 (3d Cir. 1980); *United States v. Reprints, Inc.,* 79-1 U.S.T.C. ¶ 9108 (N.D. Ga. 1978). See also *United States v.*

Berkowitz, 488 F.2d 1235 (3d Cir. 1973); *United States v. Theodore,* 479 F.2d 749 (4th Cir. 1973). It would be most impractical and also unnecessary, under this subsection, to require the IRS to manually search through thousands or hundreds of thousands of tax returns for the three years in question to determine the identity of each donor in kind to BYU. That this would have to be done satisfies the court that such information is "not readily available."

[3] Before discussing the requirements of subsection (2) of § 7609(f) there are two other issues that can be briefly resolved. Both the IRS and BYU agree that BYU is not a third-party recordkeeper pursuant to § 7609(a)(3). BYU argues that a John Doe summons may only be issued to third-party recordkeepers as enumerated in § 7609(a)(3). It appears clear from the language of § 7609 and the legislative history that such an interpretation is not correct. It also appears that the only court to rule on the issue did not restrict the issuance of John Doe summons to only the third parties enumerated in § 7609(a)(3). *United States v. Reprints, Inc., supra.* This court holds therefore that this summons would be properly issuable to BYU under these circumstances if the other requirements of § 7609(f) were met.

[4] BYU's claim that the information demanded by the IRS may interfere with the donors' freedom of association under the First

Amendment is also without merit. *NAACP v. Alabama,* 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) and *United States v. Citizens State Bank,* 612 F.2d 1091 (8th Cir. 1980) do not compel this court to refuse enforcement of the summons and the information requested. Even assuming that the IRS received the information on the donors and the flow of gifts in kind to BYU was thereafter reduced, there would still not be a violation of the associational rights of donors to BYU under the authority of these two cases.

[5] Finally, and before reaching the determinative issue, there is one further point to consider. The government contends that BYU should not be allowed to challenge enforcement of the summons on the ground that the petitioners have failed to meet the requirements of § 7609(f). The rationale for this argument is that the court has already issued an order for leave to serve the summons and any attempt by BYU to challenge that order would be an attempt to relitigate a prior determination of the court. The court finds no merit to that contention. The order authorizing the summons was signed ex parte based on the petition and motion of the government and the affidavit of a representative of the IRS. It would be inappropriate to rule that because the court had signed an ex parte order, it should now refuse to consider in a contested proceeding the claim of

a party that the requirements of the applicable statute were not fulfilled. This is particularly so where this court has heretofore had served upon BYU an order to show cause directing it to appear and show cause why it "should not be compelled to obey" the IRS summons. That is exactly what BYU is now attempting to show and it should be permitted to do so if it has a legitimate basis.

The critical issue thus becomes whether there is a reasonable basis for believing that the individuals in the unaudited class of donors in kind to BYU have overvalued their donations. BYU has objected to the statement in the magistrate's report that "[t]here is logic in saying that, because all known members of a group have overvalued, one or more of the unknown members of the group might likewise have overvalued." BYU argues that the 148 donors in the art object and silver mining groups, whose identity it has offered to furnish, must be distinguished from the other fourteen individuals whom the IRS has found to have overvalued. It further argues that there is no rational basis for concluding that because these fourteen did overvalue their gifts that other donors in kind to BYU have overvalued theirs.

[6] The government argues that since every one of the returns of the 162 BYU donors in kind audited to date has shown overvaluation, there exists unusual or suspicious circumstances

which create a likelihood that the other donors in kind to BYU have overvalued their donations. It points out, and correctly so, that the standard required to invoke the "reasonable basis for believing" requirement of § 7609(f)(2) is not mathematical certainty. What is required is some logical basis for believing that because some members of the class have been shown to have violated the revenue laws, there is reasonable likelihood others may have done so.

[7] So far as it appears from the record, the only argument of the IRS in support of satisfying § 7609(f)(2) is that because every donor in kind to BYU who has been investigated to date has been found to have overvalued his or her gift, that this suggests or should make one suspicious that there has been overvaluation by other donors in kind. Implicit in this argument is that there is some characteristic common to donors in kind to BYU that causes them to overvalue their donations. The court rejects this contention and holds that there is no reasonable basis to believe that one or more BYU donors have overvalued their gifts simply because one or more other donors have overvalued theirs.

The court also rejects the notion that as the number of donors shown to have overvalued their gifts increases, there is a greater likelihood other donors (acting independently and with no unique or common characteristic) have overvalued their gifts.

There has been no showing that BYU donors have a uniform characteristic or that BYU exercises any influence over its donors to cause them to overvalue their donations. Unless this court is to conclude there is something inherently suspicious or unique about donors in kind to BYU, it is as logical to believe, based on the showing the IRS has made in this case, that donors in kind to other private universities or, for that matter, donors in kind to any charity, have overvalued their gifts as that the unaudited donors to BYU have overvalued theirs.

The cases relied upon by the IRS do not compel a different result. Those cases include *United States v. Carter,* 489 F.2d 413 (5th Cir. 1973); *United States v. Turner,* 480 F.2d 272 (7th Cir. 1973); *United States v. Theodore,* 479 F.2d 749 (4th Cir. 1973). Each of these cases involved the Tax Preparer's Project of the IRS in which undercover IRS agents would take a sample return to be prepared and then summons the records of the tax preparer if the return was wrongfully prepared. Either by direct holding or by the reasoning of these three cases, the IRS was allowed to obtain the names of all persons for whom the respondent had prepared tax returns when the respondent incorrectly prepared the IRS agent's tax return. Certainly there is some logic in believing that if a tax preparer prepared one return wrongfully he may have done so with other returns. However, that reasoning is not applicable to the present case.

The government also relies on the legislative history of § 7609 and particularly *United States v. Bisceglia,* 420 U.S. 141, 95 S.Ct. 915, 43 L.Ed.2d 88 (1975), for the proposition that if there exists unusual or possibly suspicious circumstances it is proper for the IRS to use a John Doe summons. The court agrees with that proposition, but does not agree this case presents facts "so suggestive of possible tax liability that the Service would be remiss in its duty of collection and enforcement of the Internal Revenue laws if it did not investigate." H.R. Rep. No. 94-658, 94th Cong., 2d Sess. 311, *reprinted in* [1976] U.S. Code Cong. & Admin. News, pp. 2897, 3207. To say that unrelated, independent donors to BYU present a suspicious circumstance, with nothing more, goes against the clear legislative history of § 7609 and the holding and facts of *Bisceglia.*

Under our voluntary tax reporting system where each citizen must pay his or her fair share of the tax, the court recognizes that in order to insure compliance, the IRS must be given the broadest latitude to investigate possible irregularities in the reporting of income and deductions. Nevertheless, and as applied to the statute in question here, this does not mean the IRS may require a third party to furnish the names and addresses of all members of a class simply because the investigation of some members of that class has disclosed irregularities on

their returns. In order to satisfy the requirements of § 7609(f) in this case, it is not enough to state that because the BYU donors investigated to date have overvalued their gifts, there is a reasonable basis to believe that all such donors have overvalued their gifts.

Accordingly, the court holds that the requirements of § 7609(f)(2) have not been satisfied in this case and therefore the respondents are not required to comply with the summons.

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 80-1508

UNITED STATES OF AMERICA AND JAMES OYS, an Officer of the Internal Revenue Service,	)	
Appellants,	)	
v.	)	Appeal from the United States District Court for the District of Utah
BRIGHAM YOUNG UNIVERSITY and DALLIN H. OAKS, President of Brigham Young University,	)	(D.C. No. C-79-0753)
Appellees.	)	

William A. Whitledge (Michael L. Paup and

Charles E. Brookhart, Attorneys, Tax Division, Department of Justice; and M. Carr Ferguson, Assistant Attorney General; Of Counsel: Ronald L. Rencher, United States Attorney, with him on the brief), Washington, D.C., for Appellants.

H. Hal Visick (Eugene H. Bramhall, with him on the brief), General Counsel's Office, Brigham Young University, Provo, Utah, Attorneys for Appellees.

Before McWILLIAMS, DOYLE, and SEYMOUR, Circuit Judges.

McWILLIAMS, Circuit Judge.

This is an appeal by the United States, and James Oys, an officer of the Internal Revenue Service, from a judgment of the United States District Court for the District of Utah, denying enforcement of an IRS summons served on Brigham Young University (BYU). The opinion of the district court appears as United States v. Brigham Young University, 485 F. Supp. 534 (D. Utah 1980).

The summons here involved is a John Doe summons whereby the IRS seeks to learn from BYU officials the names of those who made charitable contributions *in kind* to BYU, not including securities, for the tax years 1976, 1977,

and 1978.[1] The district court, the Honorable Aldon J. Anderson presiding, authorized service of the summons here involved pursuant to the provisions of 26 U.S.C. § 7609(f) and (h). Section 7609(f) mandates a preservice showing of relevance and necessity for the summonses which do not identify the taxpayer, or taxpayers, with respect to whose liability they are issued. The statute provides that a John Doe summons may be served only after a "court proceeding" in which the Secretary establishes: (1) the summons relates to the investigation of a particular person or ascertainable group or class of persons; (2) there is a reasonable basis for believing that such person or group of persons may fail or may have failed to comply with any provision of any internal revenue law; and (3) the information sought to be obtained from the examinations of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources. Section 7609(h)(1) further provides that the "court proceeding" shall be conducted *ex parte,* and that any factual determination by the court is to be made solely on

[1]BYU is an educational institution which is exempt from income taxation pursuant to Section 501(c) of the Internal Revenue Code of 1954. 26 U.S.C. § 501(c). Section 170 of the Code provides that charitable contributions to an exempt educational institution are deductible from the income of the donor.

the basis of the petition and supporting affidavits.

The John Doe summons above referred to, service of which was authorized by Judge Anderson, was subsequently served on BYU. BYU, however, declined to comply with the summons, whereupon the United States instituted the present proceedings to enforce the summons pursuant to subsections 7402(b) and 7604(a) of the Internal Revenue Code.[2]

The enforcement proceeding was heard by another federal district judge for the District of Utah, the Honorable David K. Winder. At the enforcement proceeding, BYU objected to enforcement on several grounds, only one of which was relied on by the district court for refusing to enforce.[3] The district court declared that the "critical issue thus becomes whether there is a reasonable basis for believing that the [un-

[2]Subsections 7402(b) and 7604(a) both grant jurisdiction to the district courts to compel attendance, testimony, or production of papers or books of any person summoned under the internal revenue laws.

[3]BYU contended the summons was invalid because the IRS was without a reasonable basis for believing that charitable contributors in kind to BYU had failed to comply with the internal revenue laws in violation of 26 U.S.C. § 7609(f)(2). Furthermore, BYU asserted the information was readily available to the IRS through its own files; thus, the § 7609(f)(3) showing had not been met. The University con-

known] individuals in the unaudited class of donors in kind to BYU have overvalued their donation." In this regard, the district court held that the IRS had failed to establish a "reasonable basis" for thus "believing," and denied enforcement for failure to comply with the requirement of 26 U.S.C. § 7609(f)(2). In so holding, the district court erred. We therefore reverse.

In the district court, the government argued that BYU could not challenge, in the enforcement proceeding, the determination previously made by Judge Anderson that the IRS had established a "reasonable basis for believing that such person, or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law." The district court rejected this argument. On appeal, the government's initial position is that the district court erred in permitting BYU to challenge, in

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ceded that the IRS had met the requirements of § 7609(f)(1). In addition, BYU argued that it was not a third-party recordkeeper within the meaning of § 7609(a)(3); therefore, it was not amenable to the service of a John Doe summons under any circumstance. Finally, in supplemental authority, BYU urged that enforcement of the summons would infringe upon the donors' freedom of association under the first amendment. The district court held that all save one of these contentions were without merit. 485 F. Supp. at 536-37. BYU does not renew them on appeal.

the enforcement proceeding, the earlier determination by Judge Anderson that there had been compliance with 26 U.S.C. § 7609(f)(2). In this regard the IRS argues that the showing required by subsection 7609(f)(2) is, under subsection 7609(h), to be determined in an *ex parte* proceeding, and that a determination that there has been compliance with subsection 7609(f)(2) cannot be challenged in an enforcement proceeding. We do not agree with this argument.

26 U.S.C. § 7609(f)(2) sets forth a requirement that must be met by the government *before* a John Doe summons may be served. We are now past that point.[4] The district court found that there was a compliance with § 7609(f)(2)

[4]The legislative history to section 7609 reveals that the thrust of this provision was to provide taxpayers with notice of the service of a third-party summons and right to challenge the summons in court. *See* H.R. Rep. No. 94-658, 94th Cong., 1st Sess. (1975), *reprinted in* [1976] U.S. Code Cong. & Ad. News 2897, 3202; S. Rep. No. 94-938, 94th Cong., 2d Sess., *reprinted in* [1976] U.S. Code Cong. & Ad. News 3439, 3796. In the cases of John Doe summonses, however, it was not possible for the IRS to comply with the notice requirement provided in subsection (a) of the bill. Nor, for the most part, could John Does intervene in enforcement proceedings as they frequently were unaware that a summons had issued. Thus, Congress elected to require the IRS to seek court approval and demonstrate reasonable cause before it could serve a John Doe summons on a third party. The procedure imposed by Congress in subsection (f) is best characterized as a prior restraint on the service of John Doe summonses enacted for the protection of the privacy of unknown taxpayers.

and authorized service of the summons. Pursuant to such authorization, service was made on BYU. When BYU refused to comply with the summons, the government instituted the present enforcement proceedings. In those proceedings, BYU was by order of court directed to show cause why it should not be compelled to obey the summons. BYU appeared in the enforcement proceedings and, as one ground for denying enforcement, challenged the earlier *ex parte* determination that the requirement of 26 U.S.C. § 7609(f)(2) had been met. We do not believe that the provisions of 26 U.S.C. § 7609(h) bar BYU from challenging in the enforcement proceedings the prior *ex parte* determination that there had been compliance with 26 U.S.C. § 7609(f)(2).[5]

An enforcement proceeding is "an adversary proceeding affording a judicial determination of

[5]Third parties traditionally have enjoyed the right to challenge John Doe summonses served upon them by the IRS requesting the production of documents in their custody. *See, e.g.*, United States v. Bisceglia, 420 U.S. 141 (1973); Reisman v. Caplin, 375 U.S. 440 (1964). Although section 7602 grants the IRS broad power to issue summonses, including John Doe summonses, to facilitate tax investigations, the Service lacks the authority to directly enforce summonses. That power is vested in the district courts pursuant to 7402(b) and 7604(a). United States v. Harris, 628 F.2d 875, 879 (5th Cir. 1980). *Accord,* United States v. Moon, 616 F.2d 1043, 1045 (8th Cir. 1980) (per curiam); United States v. Theodore, 479 F.2d 749, 751 (4th Cir. 1973).

the challenges to the summons and giving complete protection to the witness" and "the witness may challenge the summons on any appropriate grounds." Reisman v. Caplin, 375 U.S. 440, 446, 449 (1964). Further, in an enforcement proceeding, the district court may, under proper circumstances, "inquire into the underlying reasons for the examination." United States v. Powell, 379 U.S. 48, 58 (1964). In *Powell,* the Supreme Court also observed that since it is the court's process which is being invoked to enforce the administrative summons, the court should not permit its process to be abused. We do not believe that the provisions now appearing at 26 U.S.C. § 7609 render inapplicable the principles set forth in such cases as *Reisman* and *Powell.* We conclude that subsection 7609(f)(2) may be raised by third parties as an appropriate ground on which to challenge a summons in an enforcement proceeding in order to prevent abuse of the court's process. In United States v. Pittsburgh Trade Exchange, Inc., 644 F.2d 302 (3rd Cir. 1981) the Third Circuit rejected the argument advanced here by the government.

The critical issue in the present appeal is whether the district court in the enforcement proceeding erred in holding that there had been noncompliance with 26 U.S.C. § 7609(f)(2). We conclude that it did commit error in this regard.

James Oys, Chief of the Examiner's Section of the Internal Revenue Service, assigned to the

Salt Lake City, Utah, Office, was the only witness called by either party at the enforcement proceeding. Oys' testimony at the enforcement hearing paralleled his affidavit which was before Judge Anderson when he authorized service of the summons on BYU.

From Oys, we learn that prior to petitioning the district court for permission to serve the John Doe summons on BYU, the IRS had audited the tax returns of 162 individual taxpayers who had claimed a deduction for charitable contributions, in kind, to BYU. In every instance the examining agent had determined that the value of the gift claimed as a deduction on the return thus audited was excessive. The aggregate value of the gifts claimed on these tax returns was approximately $18,000,000, and the IRS disallowed approximately $16,000,000 of the claimed deductions. The IRS asserts that the results of these audits constitute a "rational basis" for believing that other taxpayers who also made contributions in kind to BYU may have overvalued their gifts to BYU. We agree with this argument.

The statute provides that in order for the IRS to serve a John Doe summons the Secretary must establish to the satisfaction of the district court a "reasonable basis for believing" that "such person or group or class of persons" may have failed to comply with the tax laws. Under the statute, the Secretary does not have to show

that there has actually been a tax violation. Such would be an overly rigorous test not required by the statutory language employed by Congress.[6] And, under the statute, the "belief" is that the unidentified individual taxpayer, or

[6]In reports by the House Ways and Means Committee and the Senate Finance Committee on the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, formerly H.R. 10612, the following explanation of subsection (f)(2) appears:

> While the committee believes it is important to preserve the John Doe summons as an investigative tool which may be used in appropriate circumstances, at the same time, the committee does not intend that the John Doe summons is to be available for purposes of enabling the Service to engage in a possible "fishing expedition." For this reason, the committee intends that when the Service does seek court authorization to serve John Doe summons, it will have specific facts concerning a specific situation to present to the court.
>
> On the other hand, the committee does not intend to impose an undue burden on the Service in connection with obtaining a court authorization to serve this type of summons. For example, the Service is not required to show that there is "probable cause" (within the meaning of the criminal laws relating to the issuance of a search warrant) to believe that a criminal act has occurred, or even that civil fraud has occurred, or might be involved. It is enough for the Service to reveal to the court evidence that a transaction has occurred, and that the transaction (in the context of such facts as may be known to the Service at that time) is of such a nature as to be reasonably suggestive of the possibility that the correct tax liability with respect to that transaction may not have been reported (or might not be reported in the case of a current year transaction, with respect to which a return is not yet due). . . . H.R. Rep. No. 94-658, 94th

the group of taxpayers to which he, or she, belongs, "may have failed" to comply with the tax laws. In short, the test laid down by Congress is one of reasonableness, and in our view, the IRS in the instant case met that test. The facts here are not in dispute. The district court simply erred in concluding that such facts failed to meet the statutory requirement. Where an audit of 162 individual tax returns of taxpayers claiming deductions for charitable contributions in kind to BYU revealed that in each instance the amount of the contribution was overvalued, and generally grossly overvalued, that fact forms a reasonable basis for believing that out of the approximately 150 other persons making charitable contributions in kind to BYU, some of them also may have overvalued their gift to BYU.

BYU points out that of the 162 returns which overvalued the deduction for a charitable contribution to BYU, the great majority involved donations of art objects and silver mining claims. In this regard, BYU offered to disclose to the IRS the names of all of its donors of art objects and silver mining claims. IRS declined to accept this offer, and insists that, under the

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Cong., 1st Sess. 311 (1975), *reprinted in* [1976] U.S. Code Cong. & Ad. News 2897, 2897; S. Rep. No. 94-938, 94th Cong., 2d Sess. 373, *reprinted in* [1976] U.S. Code Cong. & Ad. News 2897, 3439.

circumstances, the John Doe summons authorized by 26 U.S.C. § 7609(f) should not be thus limited or restricted. We agree with the IRS. The fact that the vast majority of the returns audited involved gifts of art or silver mining claims does not mean that the John Doe summons should be limited to ascertaining only the names of other donors of art and mining claims. The fact remains that of the 162 returns audited, including some that did not involve gifts of art or silver mining claims, in every instance the donor overvalued his contribution on his tax return.

Two recent cases which shed light on the present controversy are In the Matter of the Tax Liability of John Does, Members of the Columbus Trade Exchange in the Years 1977 and 1978, 671 F.2d 977 (6th Cir. 1982) and United States v. Pittsburgh Trade Exchange, Inc., 644 F.2d 302 (3rd Cir. 1981). Both of these cases involved a "barter exchange," which operates as a clearing house for the exchange of goods and services, other than for cash, between members of the exchange. In each case the IRS sought to serve a John Doe summons on a named barter exchange to obtain the names of the exchange's members, and the IRS alleged as its "reasonable basis for believing," under 7609(f)(2), that audits of tax returns of members of *other* barter exchanges had revealed a high incidence of improper reporting.

In *Columbus Trade Exchange,* the district court declined to authorize the service of the John Doe summons on the barter exchange there involved, finding that the IRS had failed to meet the requirement of 7609(f)(2). In reversing, the Sixth Circuit held that the district court interpreted the statutory standard set forth in 26 U.S.C. § 7609(f) "in too rigorous a manner." The Sixth Circuit analyzed the statute in the light of legislative history, and concluded that Congress did not intend to impose stringent restrictions on the Secretary's investigatory function, but sought only to prevent any "arbitrary or quixotic use" of the John Doe summons power. 671 F.2d at 980.

In *Pittsburgh Trade Exchange,* the Third Circuit upheld enforcement of a John Doe summons served on a barter exchange, relying upon testimony from IRS agents that prior audits of tax returns of members of other barter exchanges demonstrated that barter transactions are "inherently susceptible to tax errors." 644 F.2d 306.

We believe that these cases tend to support our conclusion that in the instant case the IRS had a reasonable basis for believing that some of the unidentified donors of contributions in kind to BYU may have failed to file proper tax returns. In our view, the IRS has made a stronger showing of reasonableness in the instant case than it did in either *Columbus Trade*

Exchange or *Pittsburgh Trade Exchange,* where there had been no audit of any member of the particular exchange whose membership was sought, only an audit of members of other barter exchanges.

In sum, BYU, as a private institution of higher learning, is exempt from taxation under 26 U.S.C. § 501(c)(3). In line therewith, gifts to BYU are charitable contributions and as such, deductible from the donor's income. Such deduction, however, is limited to the fair market value of the gift. In the present case, BYU itself is not under investigation. All that the IRS seeks are the names of some 150 presently unidentified donors of charitable contributions in kind to BYU.[7] We conclude that having previously examined the returns of some 162 donors of gifts in kind to BYU and having found that all were overvalued, the IRS has established a reasonable basis for believing that *some* of the remaining donors of in kind gifts *may* have also overvalued their gifts. Such reasoning makes sense to us.

Judgment reversed and case remanded with direction that the district court order enforcement of the summons.

[7]The number of unidentified donors is based on our understanding of the affidavit of Dallin H. Oaks, then president of BYU, which was attached to BYU's memorandum in opposition to enforcement of the summons.

APPENDIX C

JULY TERM—August 26, 1982

Before Honorable Robert H. McWilliams, Honorable William E. Doyle, and Honorable Stephanie K. Seymour, Circuit Judges

UNITED STATES OF AMERICA and JAMES L. OYS, an Officer of the Internal Revenue Service,	)	
Plaintiffs-Appellants,	)	
vs.	)	No. 80-1508
BRIGHAM YOUNG UNIVERSITY, and DALLIN OAKS, President of Brigham Young University,	)	
Defendants-Appellees.	)	

This matter comes on for consideration of appellee's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

By

Robert L. Hoecker
Chief Deputy Clerk

APPENDIX D

§ 7601. Canvass of districts for taxable persons and objects

(a) General rule.—The Secretary or his delegate shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

(b) Penalties.—

> **For penalties applicable to forcible obstruction or hindrance of Treasury officers or employees in the performance of their duties, see section 7212.**

§ 7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

§ 7609. Special procedures for third-party summonses

(f) Additional requirement in the case of a John Doe summons.—Any summons described in subsection (c) which does not identify the person with respect to whose liability the summons is issued may be served only after a court proceeding in which the Secretary establishes that—

(1) the summons relates to the in-

vestigation of a particular person or ascertainable group or class of persons,

(2) there is a reasonable basis for believing that such person or group or class of persons may fail or may have failed to comply with any provision of any internal revenue law, and

(3) the information sought to be obtained from the examination of the records (and the identity of the person or persons with respect to whose liability the summons is issued) is not readily available from other sources.

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FILED
DEC 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-820

In the Supreme Court of the United States

OCTOBER TERM, 1982

BRIGHAM YOUNG UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

LAWRENCE G. WALLACE
Acting Solicitor General
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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-820

BRIGHAM YOUNG UNIVERSITY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of the decision below enforcing an Internal Revenue summons requiring it to produce the names and addresses of all those from whom it had received donations of property in kind (other than securities) during the years 1976 through 1978. Subsequent to the filing of the petition, petitioner fully complied with the summons. The case is therefore moot.

The pertinent facts showing that the case is moot are as follows: On November 5, 1979, the government filed a petition in the United States District Court for the District of Utah, pursuant to Section 7609(g) and (h) of the Internal Revenue Code of 1954 (26 U.S.C.), seeking leave to serve a John Doe summons on petitioner requiring it to produce the names and addresses of all those who contributed to it property in kind (other than securities) during the years

1976 through 1978. The district court granted leave to serve the summons on November 14, 1979. Upon petitioner's refusal to comply with the summons, the government instituted enforcement proceedings on December 21, 1979 (Pet. App. 1a). The district court refused to enforce the summons (Pet. App. 1a-7a), but the court of appeals reversed and ordered enforcement (Pet. App. 8a-16a). The court of appeals issued its mandate on September 6, 1982, and denied petitioner's motion to recall the mandate on November 12, 1982. On November 17, 1982, Justice White denied petitioner's motion for a further stay. We are advised by the Internal Revenue Service that on November 19, 1982, petitioner fully complied with the summons.

Enforcement of the terms of the summons was the only relief sought by the government in this action. The various defenses raised by petitioner in both the district court and the court of appeals were aimed at preventing that enforcement. Since petitioner has now complied with the summons by producing the names and addresses of the donors of property during the years 1976 through 1978, there is no longer a live controversy between the parties. The case is therefore moot. *United States* v. *Kis*, 658 F. 2d 526, 532-533 (7th Cir. 1981), cert. denied, No. 81-1272 (Mar. 22, 1982); *United States* v. *Patmon*, 630 F. 2d 458 (6th Cir. 1980); *United States* v. *Arthur Andersen & Co.*, 623 F. 2d 720 (1st Cir. 1980); *United States* v. *Deak-Perera International Banking Corp.*, 610 F. 2d 89 (2d Cir. 1979); *United States* v. *Hankins*, 565 F. 2d 1344 (5th Cir. 1978), cert. denied, 440 U.S. 909 (1979).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[1]

LAWRENCE G. WALLACE
*Acting Solicitor General**

DECEMBER 1982

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[1]This is the appropriate disposition, rather than granting the petition and vacating the judgment below, because the case was not moot when that judgment was entered and the petition presents no question that would have warranted this Court's review in the absence of mootness.

*The Solicitor General is disqualified in this case.

DOJ-1982-12